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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1357

COOKE COUNTY ELECTRIC COOPERATIVE ASSOCIATION,
Petitioner,

v.

TOWN OF LINDSAY, TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

RICHARD S. STARK,
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March 15, 1974

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COOKE COUNTY ELECTRIC COOPERATIVE ASSOCIATION,

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v.

TOWN OF LINDSAY, TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

The Petitioner, Cooke County Electric Cooperative Association, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Texas, rendered in these proceedings on November 21, 1973. The Respondent is Town of Lindsay, Texas.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Texas, 502 S.W. 2d 117, appears at Appendix A, infra, pp. A-1 - A 4. The opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, 497 S.W. 2d 406, appears at Appendix B, infra, pp. B-1 - B-4. The Judgment of the Trial Court, 235th Judicial District of Cooke County, Texas, appears in Appendix C, infra. pp. C-1 - C-6. The Supreme Court of Texas reversed the Judgment of the Court of Civil Appeals, Second Supreme Judicial District. The Court of Civil Appeals had upheld the verdict for Petitioner in the District Court.

JURISDICTION

The order or judgment of the Supreme Court of the State of Texas was entered on November 21, 1973; Motion for Rehearing was denied on December 19, 1973; and Motion for Stay of Mandate was granted on January 8, 1974, and issuance of Mandate to the District Court was stayed until March 19, 1974, pending Application for Writ of Certiorari to the United States Supreme Court. See Appendix A, infra. pp. 17-20. This petition for certiorari was filed less than ninety (90) days from the date of the denial of Motion for Rehearing in the Supreme Court of Texas. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Does the due process clause of Amendment XIV, United States Constitution, prohibit a municipal corporation (the Respondent) from repudiating its contract and repealing a franchise ordinance which it had granted to an electric utility company (the Petitioner) to serve Petitioner's members in Respondent town without Respondent town first giving notice and affording opportunity for hearing:

   A. To the Petitioner utility company grantee?

   B. To the affected member-consumers of Petitioner, an electric cooperative association?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section I:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF FACTS

This case is one seeking due process under Amendment XIV, of the United States Constitution.

The Petitioner is Cooke County Electric Cooperative Association, a distribution cooperative engaged in the electric utility business. The Respondent is Town of Lindsay, Texas, a municipal corporation. The Respondent initiated this case seeking injunctive relief, attempting to restrain and enjoin the Petitioner from use of its streets, alleys and public ways in the Town of Lindsay in connection with Petitioner's business of serving its members, electric utility consumers.

The Respondent town had granted a franchise to Petitioner to use such public areas for a period of fifty (50) years by virtue of a franchise ordinance dated March 24, 1960. (Tr. p. 66-70).

The Petitioner answered praying for affirmative injunctive relief restraining and enjoining the Respondent from attempting to enforce an ordinance Respondent had passed repealing Petitioner's franchise ordinance and repudiating its contract entered into between the parties providing for Petitioner to furnish electric utility service within the Respondent town. Such repealing ordinance and contract repudiation was done by Respondent without notice or hearing to Petitioner or its affected members-consumers.

The trial court, 235th Judicial District Court of Cooke County, Texas, after jury trial, denied Respondent the in-

junctive relief it sought and granted to the Petitioner an injunction restraining the Respondent from interfering with its contractual franchise rights (Tr. pp. 66-72).

The intermediate Appellate Court, Court of Civil Appeals for the Second Supreme Judicial District of Texas sitting in Fort Worth, Texas, affirmed the judgment of the trial court. *Town of Lindsay, Texas, v. Cooke County Electric Cooperative Association*, 497 S.W. 2d 406.

The Supreme Court of Texas reversed the trial court and Court of Civil Appeals with instructions to the trial court to grant Respondent injunctive relief ousting the Petitioner from use of public streets and ways of Respondent's town. *Town of Lindsay, Texas, v. Cooke County Electric Cooperative Association*, 502 S.W. 2d 117, dated November 21, 1973; Motion for Rehearing overruled December 19, 1973.

The Contract and Franchise Ordinance

At the invitation of one of the Respondent's Town Council members (S.F. p. 79, lines 10-16), Petitioner was invited to submit a franchise contract to Respondent and its Town Council at its meeting on March 24, 1960. The purpose of such franchise ordinance was understood by both parties to legally entitle Petitioner to continue to serve its members in the Respondent town, a rural area, and to exact by Respondent of Petitioner a franchise tax in consideration of such grant. Petitioner caused its attorney to draft the proposed franchise ordinance and the same was submitted, with the authority of Petitioner's Board of Directors (S.F. p. 119, lines 15-24). The Town of Lindsay, Respondent, at this meeting on March 24, 1960, took the following action by unanimous vote:

> "ORDINANCE NO. 2 — The R.E.A. Contract was discussed with the Council and the motion was made by Frank Haverkamp, Jr., and seconded by Joe Bengfort, to accept the fifty (50) year contract that was offered. The motion carried unanimously. The R.E.A. is to pay two (2%) percent gross receipt tax required by the

Federal Law which is taken from April 1, to the following April 1". (S.F. p. 32, 33 and PX-12).

The Respondent admits that its Town Council unanimously passed the franchise ordinance submitted to it by the Petitioner. (S.F. p. 44, lines 7-8). The Respondent further admits that its Mayor and Town Secretary duly executed and filed the franchise ordinance here in question (S.F. p. 43, lines 7-11). However, the original of such franchise ordinance does not appear in Respondent's archives, and Respondent's Mayor and Town Secretary assert that the franchise ordinance granted to Petitioner had been lost. (S.F. p. 32, lines 7-10).

The Contract was offered by the Petitioner to the Respondent and accepted by the Respondent per Respondent's Minutes, (S.F. p. 33, line 13; p. 42, line 25; p. 43, line; and PX-12), and further pursuant to the franchise contract, the next day after its grant to Respondent, Petitioner caused its check to be issued to Respondent in payment of franchise tax (S.F. p. 83, line 6; p. 86, line 3; and DX-5), which was due six (6) days later on April 1, 1960, per the terms of the formal franchise ordinance. (S.F.-PX-7). Accompanying such check was a voucher showing "2% gross receipts tax for the year 1960" and further accompanied by statement of such gross receipts entitled "revenue received in the year 1959 from consumers located within the limits of the Town of Lindsay, Texas" (DX-5). Respondent Accepted This check in payment of FRANCHISE TAX.

On April 20, 1960, the Petitioner's Board of Directors formally approved and accepted the written franchise ordinance. (PX-8).

Repeal of Franchise Without Notice

The Respondent by its Ordinance No. 7 dated June 30, 1960, attempted to repeal its Ordinance No. 2 which granted the franchise contract to the Petitioner (DX-7). Additionally, Respondent, by an unnumbered ordinance dated October 5, 1970, also repudiated its franchise that it had

heretofore granted to Petitioner (DX-8). No notice or hearing was given Petitioner prior to the consideration passage of either ordinance (S.F. p. 52, line 14; p. 53, line 3; and p. 147, line 2, respectively). Petitioner's first notice thereof was immediately prior to trial of this case on the merits heard on April 3, 1972 (S.F. p. 89, lines 5-12).

Presentation of Constitutional Question in Courts Below

Petitioner in its pleading entitled "Defendant's Second Supplemental Petition to Defendant's First Amended Petition" fully and clearly pleads as grounds for denial of Respondent's relief sought that Petitioner had no notice of Respondent's attempt to repeal its franchise and therefore Petitioner would be deprived the valuable vested property right without due process of law, provided under the United States Constitution (Tr. p. 56).

The Court in its judgment expressly finds that Petitioner had no notice of Respondent's attempt to repeal, cancel or forfeit Petitioner's franchise (Tr. p. 70, 71).

Petitioner (Appellee in the Court of Civil Appeals) presented and briefed its defensive point supporting its affirmative relief setting forth the Federal Constitutional question as Third Counterpoint in its brief entitled "Brief for Appellee" in the Court of Civil Appeals for the Second Supreme Judicial District of Texas. (See pp. 17-19 of Appellee's Brief). The Court of Civil Appeals in its opinion did not write on the Federal Constitutional question. It found that the Petitioner was entitled to the affirmative relief it sought in the trial court and affirmed the trial court and its judgment enjoining the Respondent from interference with Petitioner's franchise rights.

The Supreme Court in its written opinion did not speak on the Federal Constitutional question presented by Petitioner (the Respondent in the Supreme Court of Texas).

(See Third Counterpoint in "Respondent's Reply Brief" in Supreme Court of Texas at p. 13).

Upon Motion for Rehearing in the Supreme Court of Texas, Petitioner pointed out to the Supreme Court of Texas the Federal Constitutional question, that Petitioner was being deprived of a valuable vested property right without due process of law. (See "Respondent's Motion for Rehearing" in the Supreme Court of Texas, § III, entitled "Forfeiture of Respondent's Franchise Without Notice or Hearing — a Property Right", at p. 12 of said Motion). Notwithstanding the Brief and Motion, the Supreme Court of Texas overruled the Motion for Rehearing without written opinion.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of the State of Texas results in the Petitioner being deprived of valuable vested property rights and its affected members being deprived of "entitlements" without due process of law. Per Respondent's minutes above quoted, an offer was made by Petitioner and was accepted by Respondent. A contract was and is the legal result as the trial judge instantly and correctly perceived (S.F. p. 42, line 25; p. 43, line 1). The contract was formalized by the franchise ordinance.

Contracts and Franchises — Property Rights Protected By Due Process Clause

A franchise is a contract and the holder thereof is protected in this property right from unlawful interference with such grant or forfeiture of it under the due process clause, Amendment XIV, United States Constitution. In character and nature, a franchise is essentially in all respects property and is governed by the same rules as to its enjoyment and protection, and is regarded by the law precisely as other property. *Frost v. Corporation Commission*, 278 U.S. 515, 73 L. Ed. 483. A franchise which constitutes a binding con-

tract is property in the constitutional sense. *Hamilton Manufacturing Co. v. Massachusetts*, 6 Wall (U.S.) 632, 18 L. Ed. 904.

The Courts have long recognized a franchise as being a valuable property right that may not be revoked without meeting the due process requirements of the United States Constitution. A franchise is a property right protected by the Constitution from arbitrary revocation, impairment, or destruction. *Superior Water, Light & Power Co. v. Superior*, 263 U.S. 125, 68 L. Ed. 204. A franchise conveys rights, and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they would be infirm in deed, in tenure and substance. *City of Los Angeles, et al, v. Los Angeles Gas & Electric Corp.*, 251 U.S. 32, 64 L. Ed. 121.

In *New York Electrical Lines Co. v. Empire City Subway Co.*, 235 U.S. 179, 59 L. Ed. 184, this Court held:

> "In case of revocation, withdrawal, or cancellation for non-use or mis-use of the franchise, apart from the exercise of reserved powers, the privileges conferred may be withdrawn by such methods of procedure as are consistent with established legal principles, or as are not repugnant to established principles of justice."

See also, *Public Service Commission of Puerto Rico v. Havermeyer*, 296 U.S. 506, and *York County Natural Gas Authority v. Carolina Pipe Line Co.*, 238 F. Supp. 964, Aff. C.A., 388 F. 2d 297, cert. den., 393 U.S. 824, which also recognize a franchise as being a valuable property right protected under the Amendment XIV of the United States Constitution.

Municipalities must adhere to the due process requirements of the United States Constitution in the enactment of ordinances and regulations affecting utility, transportation, and other franchise holders. In *City of Detroit v. Detroit Citizen's Street R.R. Co.*, 184 U.S. 368, 22 Sup. Ct. 410,

66 L. Ed. 592, a Grantee of a railway franchise was denied its constitutional right of due process by a municipal council by it action in reducing railway rates at its own pleasure without notice to the holder of the railway franchise.

The correct rule, we believe, was set forth in *Ashland Electric Power, etc. Co., v. Ashland* (D.C. Or. 1914) 217 F. 158, where the Court held:

> "If a corporation has acquired the right and privilege of constructing and maintaining an electric lighting system within a city by irrevocable grant or contract, any attempt on the part of the City to summarily oust the corporation would be tantamount to depriving it of its property without due process of law."

Amendment XIV of the United States Constitution prohibits the Respondent, a municipality, from divesting the Petitioner, an electric utility company, of contractual rights granted to it, as here in the present case. The municipality failed to give the electric company notice that it intended to consider an ordinance repealing such franchise rights and affording the electric utility company, the Petitioner herein, an opportunity for a hearing upon such proposed repealing ordinance.

In all proceedings herein, Respondent has made no contention or pretense that Petitioner was given any notice or afforded any opportunity to be heard in opposition to Respondent's ordinances repealing Petitioner's franchise (S.F. p. 136, lines 11-25; p. 137, line 17; and p. 143, lines 14-25; p. 147, line 11). The first notice Petitioner had of any attempted repeal of its franchise was immediately prior to trial of this cause in the trial court on April 3, 1972, some twelve (12) years after passage of Petitioner's franchise grant (S.F. p. 89, lines 5-12). The record abounds with testimony of Petitioner's service rendered pursuant to the franchise contract and in reliance upon it during such twelve (12) year period (S.F. p. 96, lines 21-25; p. 104, line 24; p. 121-129 and p. 147-151).

The Constitutional Due Process Rights of The Affected Consumers

Petitioner, at the outset of this suit, and upon its initial Answer (Tr. pp. 4 and 10) moved to join the ten (10) affected members-consumers of the Petitioner and citizens of the Respondent town as impleaded parties defendants. The trial court denied these affected parties' right to join as parties defendant (Tr. p. 60).

Amendment XIV to the United States Constitution states, *inter alia*,

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws."

Buchalter v. New York, 319 U.S. 427, 429 (1943) holds "that action by a state through any of its agencies must be consistent with the fundamental principals of liberty and justice".

The activities of state agencies, i.e. municipalities (as is the Respondent in this case), are governed by the due process clause. *Lovell v. Griffin*, 303 U.S. 444 (1938).

The due process clause applies not only to traditional personal freedoms, but also to "entitlements".

Once such "entitlement", electric service in the present case, has been provided under the authority of the state, through the municipality granting a franchise, the due process clause applies to the electric company's, the Petitioner's, members-consumers. *Bronson v. Consolidated Edison Co. of New York, Inc.*, 350 F. Supp. 443 (S.D.N.Y. 1972).

The civil rights of the Petitioner's consumers affected by the Texas Supreme Court's decision in this case have been violated or ignored. 42 U.S.C. Sec. 1983 and 23 U.S.C. Sec. 1343 (3) and (4). *Jackson v. Northern States Power*

Co., 343 F. Supp. 265 (Minn. 1972); *Davis v. Weir*, 328 F. Supp. 317 (N.D. Ga. 1971); *Ihrake v. Northern States Power Co.*, 459 F. 2d 566 (8th Cir. 1972); *Masszonia v. Washington*, 321 F. Supp. 965 (D.D.C. 1971); *Palmer v. Columbia Gas Co. of Ohio*, 342 F. Supp. 241 (N.D. Ohio W.D. 1972). The above recent cases stand for the proposition that the ultimate consumer is entitled to the protection afforded by the due process clause, Amendment XIV of the United States Constitution and the civil rights statutes. These cases involve the consumer vs. the utility company. Here the State, through its subdivision, the Respondent municipal corporation, failed to give notice or grant hearing on its repeal of the Petitioner's franchise and contractual rights to serve the consumers. With no notice or hearing afforded the affected consumers either by the Respondent municipality or the Petitioner utility company, the ultimate result is: the consumer is deprived of due process of law. *Stanley v. Gas Service Co.*, 346 F. Supp. 717 (D. Kansas 1972) speaks most eloquently to this point:

> "Nothing is more basic to the American system of values, indeed mankind, than the continued existence of life itself. Protection of rights and entitlements affecting this basic principle is the responsibility of the judiciary operating within the framework established by the legislature. In sum, therefore, whatever the classification of utility services, be they rights, privileges, or entitlements, such life-sustaining services would seem to fall within the same constitutional protections afforded welfare benefits, wages, drivers' licenses, reputation in the community, and possession of personal property, all as has been previously decided by the United States Supreme Court."

Notice and Hearing

This Court has noted the difficulties for determining adequate due process procedures. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950).

However, notice and a hearing have always been fundamental tenents of due process. *Fuentes v. Shevin*, 407 U.S. 67 (1972). For one hundred ten years the right to be notified and heard has been recognized. *Baldwin v. Hale*, 68 U.S. 223 (1864). The notice and hearing must be *before* the termination becomes effective. *Bell v. Burson*, 402 U.S. 535 at p. 542.

The above cited cases hold the notice must be actual and meaningful, coupled with action or recourse at hearing or appellate procedure available to the party (ies) affected. Such notice or hearing was never given to Petitioner or its members-consumers.

CONCLUSION

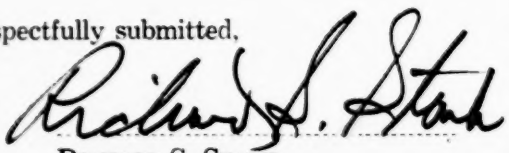
The Respondent city accepted an offer made by the Petitioner electric company to serve citizens of the Respondent city with electric service for a period of fifty (50) years from March 24, 1960. Pursuant to this contract, the Respondent city, through its governing body, unanimously enacted a franchise ordinance granting to Petitioner the right to use the streets and public ways of the city in furtherance of this contract and its stated purposes. Petitioner did use such public ways and streets for a period of twelve (12) years and it was then first revealed to the Petitioner that Respondent attempted to abbrogate its franchise and summarily oust the Petitioner. The trial court and intermediate Appellate Court (Court of Civil Appeals) thwarted this unlawful and summary assumption of power by Petitioner. Eight members of the Supreme Court of Texas, by its opinion herein substituted their decision for that of the unanimous verdict of the twelve person jury, the trial judge, the three judges of the Court of Civil Appeals and the one dissenting judge in the Supreme Court of Texas to deprive the Petitioner of its contract and franchise rights and its ten affected members-consumers of their entitlements to electric service without notice or hearing.

The above action is violative of the prohibitions contained in Amendment XIV of the United States Constitution, and

such will be the result if the judgment of the Supreme Court of Texas is permitted to stand.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Texas.

Respectfully submitted,



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AFFIDAVIT OF SERVICE

THE STATE OF TEXAS }
COUNTY OF COOKE }

RICHARD S. STARK, being first duly sworn, deposes and says:

I, RICHARD S. STARK, acting as attorney for Cooke County Electric Cooperative Association, have served three (3) copies of the foregoing Petition for Writ of Certiorari upon the adverse party herein by depositing the same in a United States Post Office or mail box, with first class postage prepaid, addressed to the counsels of record for the Respondent, Town of Lindsay, Texas, viz:

Mr. H. Louis Nichols
Saner, Jack, Sallinger & Nichols
Attorneys at Law
1200 Republic National Bank Bldg.
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and

Mr. Belvin R. Harris
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209 South Dixon Street
Gainesville, Texas 76240

Richard S. Stark

Richard S. Stark

SWORN TO AND SUBSCRIBED BEFORE ME by the said RICHARD S. STARK, on this the 6th day of March, 1974, to certify which witness my hand and seal of office.

Barry D. Moore

Notary Public in and for
Cooke County, Texas

APPENDIX A

In the

Supreme Court of Texas

No. B-4019

TOWN OF LINDSAY, TEXAS,

Petitioner,

v.

COOKE COUNTY ELECTRIC COOPERATIVE ASSOCIATION,

Respondent.

From Cooke County Second District

The controlling question in this case is whether the Cooke County Electric Cooperative Association properly accepted a franchise ordinance entitling it to operate in the Town of Lindsay. Suit was brought by the Town, petitioner here, to require the Association, respondent, to remove its lines and equipment from the streets and alleys within the corporate limits. The trial court rendered judgment on the verdict for respondent, and the Court of Civil Appeals affirmed. 497 S.W. 2d 406.

Petitioner was incorporated as a town in 1959. Respondent, which had been serving inhabitants of the area since 1938, prepared and submitted to the Town Council a proposed ordinance granting respondent a franchise for a period of 50 years from acceptance of the ordinance. The ordinance was enacted by the council on March 24, 1960, but was not immediately effective. The final section provided:

> Section 8: The Electric Cooperative Association shall file its written acceptance of this franchise within thirty (30) days after the passage of this ordinance,

> and this ordinance shall take effect and be enforced from and after its passage, approval and acceptance.

The ordinance further provided that the franchise was conditioned upon payment by respondent on April 1, 1960, and annually thereafter, of two per cent of the gross receipts from the sale of electric energy within the corporate limits during the preceding calendar year. Within a few days after March 25, 1960, respondent mailed its check for $12.45 to petitioner. The check was accompanied by a statement of the 1959 receipts from inhabitants of the town and by a voucher showing that the check was in payment of "2% Gross Receipts Tax for the Year 1960." The check was endorsed by petitioner's Secretary-Treasurer and deposited in petitioner's bank account. It was paid by the drawee bank on April 4, 1960. On April 20, 1960, the ordinance was considered at a meeting of respondent's Board of Directors, which unanimously approved the franchise agreement. The attorney retained by respondent at that time was instructed to file a formal written acceptance of the ordinance with petitioner, but there is no evidence that this was ever done.

On June 9, 1960, after expiration of the 30-day acceptance period, respondent's manager appeared before the Council and requested that the ordinance by allowed to stay in effect. No action on the matter was taken on that meeting. On June 30, 1960, the franchise ordinance was repealed and the Council at the same time ordered that the franchise tax be refunded to respondent. Petitioner thereupon issued its check for $12.45 to respondent, and the check was accepted by respondent and deposited in its bank account. In July or August, 1960, and again in 1963 and in 1970, respondent's manager appeared before the Council and requested a franchise, but the request was denied.

Under the provisions of Art. 1436a, V.A.T.S., respondent was entitled to continue operating within the corporate limits and without a franchise for ten years after the date

of the petitioner's incorporation. In 1970, after the expiration of the 10-year period, petitioner requested respondent to remove its poles and lines from the streets and alleys of the Town. Respondent declined to do so, and this suit followed.

In response to the two special issues that were submitted, the jury found: (1) that the cooperative filed its written acceptance of the franchise within 30 days after March 24, 1960, and (2) respondent's payment of the gross receipts tax by writing its check with the accompanying voucher and statement was intended by both parties as an acceptance of the franchise. It was on the basis of these findings that the trial court rendered judgment for respondent. Petitioner appealed to the Court of Civil Appeals, contending that there is no evidence to support the jury's findings. The Court of Civil Appeals concluded that the issues were raised by the evidence. We do not agree.

Where, as here, an offer prescribes the time and manner of acceptance, its terms in this respect must be complied with to create a contract. The use of a different method of acceptance by the offeree will not be effectual unless the original offeror thereafter manifests his assent to the other party. See Restatement, Contracts, § 61; 1 Williston on Contracts, 3rd ed. 1957, § 76; 17 Am. Jur. 2d, Contracts, § 44. Petitioner's Mayor and Secretary-Treasurer testified that there had never been a written acceptance of the franchise. While their testimony may not be conclusive, there is no evidence to the contrary. If the manner of acceptance had not been specified in the ordinance, respondent's act in paying the gross receipts tax might constitute an implied acceptance of the franchise. Its conduct in this respect was not, however, a written acceptance within the meaning of the ordinance, and the record does not suggest that petitioner assented to an implied acceptance. In our opinion there is no evidence to support the jury's findings, and the trial court erred in overruling petitioner's motion for judgment non obstante veredicto.

The judgments of the courts below are reversed, and the cause is remanded to the district court with instructions to render judgment for petitioner.

Original signed by Ruel C. Walker

Ruel C. Walker
Associate Justice

Associate Justice McGee notes his dissent.

Opinion delivered November 21, 1973.

APPENDIX B

No. 17376

IN THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

TOWN OF LINDSAY, TEXAS,

Appellant,

v.

COOKE COUNTY ELECTRIC COOPERATIVE ASSOCIATION,

Appellee.

From the District Court of Cooke County

OPINION

This suit was brought by the Town of Lindsay to require the Cooke County Electric Cooperative Association to remove its facilities, equipment and property from the public rights-of-way, streets, roads or alleys within the incorporated limits of the Town of Lindsay. The Town of Lindsay was incorporated in 1959. Ten years after such incorporation, in 1970, the Town of Lindsay requested the Cooke County Electric Cooperative Association to remove its lines and equipment from the public streets and alleys of the Town because it did not have a franchise from the City authorizing it to use such public streets and alleys. The Town alleged that the defendant Electric Cooperative had not been granted a permit or franchise to maintain its lines and equipment on the public streets and alleys. The defendant Electric Cooperative contended that it had been granted a franchise and was authorized to maintain its lines and equipment

within the Town. The case was tried to a jury, and based on jury verdict the trial court denied plaintiff any injunctive relief, and further enjoined the plaintiff from interfering with or impairing the rights of defendant Electric Cooperative Association to operate under the ordinance granting a franchise to the Electric Cooperative. This appeal by the Town of Lindsay is from that judgment and is based upon eight points of error.

We affirm.

By its first two points the appellant asserts that the trial court erred in overruling its motion for judgment non obstante veredicto and its motion for judgment because under the undisputed evidence it was entitled to judgment as a matter of law. Points three and four are based on no evidence and insufficient evidence.

By its points five and six the appellant contends the court erred in overruling its motion to disregard the jury's answers to special issues Nos. 1 and 2 respectively because the same had no support in the evidence and were contrary to the great weight and preponderance of the evidence. By its seventh and eighth points appellant contends the court erred in overruling its objections to the submission of special issues Nos. 1 and 2 because of all of the reasons stated in such objections. Appellant says these points (7 and 8) are germane to paragraph 1 of the amended motion for new trial. Paragraph 1 of the amended motion for new trial states that "The Court erred in overruling Plaintiff's objections to the Court's Charge to the Jury for the reasons set forth in said Objections, to which reference is here made for all purposes." "Plaintiff's objections and exceptions to the court's charge", consisting of three typewritten legal-sized pages, were filed with the District Court at 10:00 A.M., on April 5, 1972. The trial was had on April 3, 1972.

Rule 272, T. R. C. P. provides in part that "* * * The requirement that the objections to the court's charge shall be in writing will be sufficiently complied with if such objections are dictated to the court reporter in the presence of and with the consent of the court and opposing counsel, before the

reading of the court's charge to the jury, and are subsequently transcribed and the court's ruling and official signature endorsed thereon and filed with the clerk in time to be included in the transcript. * * * "

The court's official signature is not affixed or endorsed on the "Plaintiff's objections and exceptions to the court's charge."

Because of its failure to comply with the provisions of Rule 272 the said objections to the charge "shall be considered as waived" by the appellant.

Additionally the transcript does not contain a copy of the court's charge and verdict of the jury. This deficiency alone would prevent a determination by this court of the merits of the points of error directed at the court's charge. *Van Horn State Bank v. Bennett*, 428 S.W. 2d 468 (El Paso Civ. App., 1968, writ dism.).

In the absence of the court's charge and verdict in this record, we are unable to determine the issues presented by appellant's points seven and eight.

This appeal then is confined to no evidence and insufficient evidence points. In considering these points we have carefully reviewed the entire record in this cause.

It is undisputed in the record before this court that on March 24, 1960, Michael E. Sloan, the manager of the appellee Cooperative, at the request of a member of the Lindsay Town Council, the appellant herein, appeared before the Council with a franchise ordinance prepared by Mr. Cecil Murphy, attorney for the Cooperative. The appellant passed the franchise ordinance prepared by the attorney for the Cooperative voting "to accept the 50 year contract that was offered." It is undisputed that the ordinance was passed by appellee's City Council by an unanimous vote. The ordinance was signed by the appellant's Mayor and attested to by its secretary. The ordinance grants the appellee the franchise to use the streets, alleys and public areas, and to provide

electrical service to the inhabitants of the Town of Lindsay for a period of fifty years from March 24, 1960. It further provides that the appellee shall pay annually two per cent of its gross receipts earned in the preceding year, payable on April first of each year during the term of the franchise, the first payment being due on or before April 1, 1960. Paragraph 8, the last paragraph of the ordinance granting the franchise, provides that "The Electric Cooperative Association shall file its written acceptance of this franchise within thirty (30) days after the passage of this ordinance, and this ordinance shall take effect and be in force from and after its passage, approval and acceptance."

The only question involved in this lawsuit is whether or not the Electric Cooperative (appellee) filed its written acceptance. The evidence on this point was disputed. A fact issue was presented by the evidence. The jury resolved this issue against the appellant, Town of Lindsay. There is ample evidence in the record to support the answers of the jury which are recited in the judgment of the court and the judgment based upon such answers. The answers of the jury are not against the great weight and preponderance of the evidence. No useful purpose can be served by recounting the evidence introduced by the parties to this suit. We have carefully considered each point of error raised on this appeal and hereby overrule each and all of them.

Affirmed.

/s/ JACK M. LANGDON

Jack M. Langdon
Associate Justice

March 23, 1973
Not for publication per
Rule 452.

APPENDIX C

IN THE DISTRICT COURT 16TH JUDICIAL DISTRICT OF COOKE COUNTY, TEXAS

No. 70-192

TOWN OF LINDSAY, TEXAS,

Appellant,

v.

COOKE COUNTY ELECTRIC COOPERATIVE ASSOCIATION,

Appellee.

JUDGMENT

On this the 3rd day of April, 1972, came on to be heard the above entitled cause, wherein Town of Lindsay, Texas is Plaintiff and Cooke County Electric Cooperative Association is Defendant and appeared the Plaintiff and Defendant each by their duly authorized representatives and further appeared the Plaintiff by and through its attorneys, Belvin R. Harris of Sullivant, Meurer and Harris, Attorneys of Gainesville, Texas and Louis H. Nichols of Saner, Jack, Sallinger and Nichols of Dallas, Texas, and appeared Defendant by its attorney, Richard S. Stark of Stark and Barnhart, Attorneys of Gainesville, Texas, and the Court, after having empaneled a jury of Mrs. Phillip Wolfe and eleven others, proceeded to hear the pleadings, sworn evidence, motions and argument of counsel, whereupon the jury, in its verdict duly returned duly found upon the only issue of fact herein, to wit: Has the Defendant duly ac-

cepted its franchise granted to it by the Plaintiff on the 24th day of March, 1960, all as more fully set forth in Exhibit "A" attached to Defendants First Amended Answer on file herein?

1. That the Defendant had filed its acceptance of the franchise within thirty days after March 24, 1960; and

2. That the Defendant's payment of gross receipts tax by writing its check with accompanying voucher and statement of 1959 gross receipts on March 25, 1969 was intended by both parties as an acceptance by the Cooperative (Defendant herein) of the franchise granted to it on March 24, 1960, by the Town Council of Lindsay.

The Court therefore finds that the Defendant, Cooke County Electric Cooperative Association owns and is vested with a franchise as more fully set forth in Exhibit "A" of Defendant's First Amended Petition and set forth herein verbatum, to wit:

AN ORDINANCE GRANTING TO COOKE COUNTY ELECTRIC COOPERATIVE, INC. ITS SUCCESSORS AND ASSIGNS, AN ELECTRIC LIGHT, HEAT AND POWER FRANCHISE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE TOWN OF LINDSAY, TEXAS:

Section 1: There is hereby granted to the Cooke County Electric Cooperative Association, Inc., a corporation organized under the laws of the State of Texas, its successors and assigns, for a period of 50 years from the acceptance of this ordinance, the right, privilege and franchise to construct, operate and maintain in the present and future streets, alleys and public places of the Town of Lindsay, Texas, electric power lines, including poles, lines, wires, insulators, transform-

ers, arms, braces and all other necessary and usual attachments and appurtenances, for the purposes of supplying electricity to said Town of Lindsay, the inhabitants thereof, and persons and corporations both within and without the corporate limits thereof, for light, heat, power and other purposes, subject to the ordinances, rules and regulations of said Town and to the conditions and provisions of this ordinance.

Section 2: The pole or poles of the Electric Cooperative Association herein shall be placed and erected in such manner and in such places as not to interfere with the use of the streets and alleys of the Town of Lindsay by the inhabitants thereof, or with the orderly conduct of the business of said Town and the inhabitants thereof, or with the reasonable rights of any other public service corporation having a right or franchise to operate its business in said town; and the placing, construction and manner of erecting the poles and lines of the Electric Cooperative Association as well as the fixtures and attachments upon such poles, lines, and other appurtenances, shall at all times be subject to the control of the City Council of the Town of Lindsay, Texas, in order to protect the rights and conveniences of third parties and the public generally within such town.

Section 3: The service furnished hereunder to the Town of Lindsay and its inhabitants shall be first class in all respects, considering all circumstances, and shall be furnished in accordance with such reasonable rules and regulations as the Electric Cooperative Association may make from time to time. Said Electric Cooperative Association may require reasonable security for the payment of its bills. The service of the Electric Cooperative Association shall be subject to reasonable rules and regulations made by the Town of Lindsay.

Section 4: The Electric Cooperative Association shall at all times protect and save harmless the Town of

Lindsay from all damage and loss from or arising out of the operation of its power and light business.

Section 5: The rights and privileges granted by this ordinance are upon the condition that the said Electric Cooperative Association, its successors and assigns, shall on April 1, 1960, and annually thereafter on February 1, 1961 of each succeeding year during the term of this franchise, pay to the Town of Lindsay as compensation and consideration for the use of the streets, alleys and public grounds of said Town, for the purposes herein designated, a sum equal to two percent (2%) of the gross revenue it receives from the sale of electric energy for residential and commercial use by such customers of said association within the corporate limits of said Town for the 12 months' period ending with preceding December 31. So long as the Statutes of Texas permitting incorporated cities and towns to make charges for use of their streets, alleys and public ways have not been amended so as to increase the maximum amount of such charges above the limit now permitted by existing statute, this payment shall be in lieu of any other tax or increased rate of tax or other imposition, assessments, or charges, except ad valorem taxes.

Section 6: This franchise and all rights and privileges granted herein as well as any amendments thereto shall not be transferred or assigned except by and with the approval of the City Council of the Town of Lindsay.

Section 7: This franchise is not exclusive, and nothing herein contained shall be construed so as to prevent the Town of Lindsay from granting other like or similar rights and priveleges to any other person, firm or corporation, neither does it prevent the Town of Lindsay from operating its own plant for service to its citizens.

Section 8: The Electric Cooperative Association shall file its written acceptance of this franchise within

thirty (30) days after the passage of this ordinance, and this ordinance shall take effect and be in force from and after its passage, approval and acceptance.

/s/ JOE BEZNER
Mayor, Town of Lindsay, Texas

ATTEST:

/s/ RAYMOND SANDMANN
City Secretary

It is therefore ORDERED, ADJUDGED and DECREED that injunctive relief herein prayed for by Plaintiff be and the same is hereby denied.

It further appearing to the Court that Defendant has moved for injunctive relief herein to restrain and enjoin Plaintiff from enforcement of execution of its "Ordinance No. 7" attempting to repeal its "Ordinance No. 2", the franchise Ordinance set forth above; and it further appearing to the Court from uncontroverted testimony that no notice of said Ordinance No. 7 and the Plaintiff's attempt to repeal Defendant's vested franchise rights has been given to Defendant; that Defendant has heretofore attempted to pay its franchise or gross receipts tax provided by said franchise Ordinance and the same has been declined and refused by Plaintiff; that a tender of such gross receipts tax as provided by said Ordinance by Defendant to Plaintiff would have been useless and refused by Plaintiff; that Defendant has tendered into the Registry of this Court all of such franchise or gross receipts tax as provided under the franchise Ordinance

granted by Plaintiff to Defendant has complied with all of its provisions and obligations thereunder;

It is therefore further ORDERED, ADJUDGED and DECREED that Plaintiff be restrained and enjoined from enforcement of its Ordinance No. 7, its repealing Ordinance, and from, in any manner interfering with or impairing the rights of Defendant Cooke County Electric Cooperative Association granted to it by Plaintiff, Town of Lindsay, Texas by its above franchise Ordinance.

It is further ORDERED that all relief herein not expressly granted is hereby denied.

The Clerk of this Court is ORDERED to pay over all sums tendered herein by Defendant as its gross receipts tax under said franchise to the Plaintiff after deducting the costs as hereinafter set forth.

It is finally ORDERED that all costs of suit herein incurred be paid by Plaintiff for which let no execution issue, it appearing to the Court that the Clerk holds adequate funds in the Registry of the Court for the benefit of the Plaintiff, and such fund shall be applied to payment of such costs to the extent necessary to pay the same as above set forth.

To the above Judgment, Plaintiff, in open Court, objected and excepted and duly gave notice of appeal to the Court of Civil Appeals, Second Supreme Judicial District of Texas, sitting in Fort Worth, Texas.

Signed this the 4th day of May, 1972.

Original Signed by Bob Scofield

Bob Scofield, Judge Presiding